QUEK CHEK YEN v. MAJLIS DAERAH KULAI

[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) November 19, 1985 & April 24, 1986]

[Johor Bahru – Supreme Court Civil Appeal No. 99 of 1985]

Administrative Law – Termination of service of Secretary of local council – Application for declaration that termination null and void – Terms and conditions of service – Relationship contractual – Contract of employment determinable by reasonable notice – What is reasonable notice – Local Council Ordinance, 1952, s.10.

Employment – Contract of employment – Terms and conditions of service – Contract of employment terminable by reasonable notice – What is a reasonable notice – Employment Ordinance, 1955.

In this case the appellant had applied for a declaration that the termination of his service as Secretary of the Local Council, Kulai, was null and void and of no effect with the normal consequential reliefs. In his statement of claim the appellant alleged –

1) That the Chairman of the Local Council had no authority to terminate the appellant's service;

2) alternatively, the purported termination was without just cause or excuse and that no proper and fair procedure was followed;

3) by implication, custom, usage and practice the terms of service of the appellant were in parity with those of an officer in the public service and that one month's salary offered to him in lieu of notice was unreasonable and that he should have been given one year's notice.

The learned trial judge dismissed the claims. The appellant appealed.

The grounds of appeal may be summarised as follows: First the appellant challenged the finding of the trial judge that there was no evidence to support the contention that the employment of the appellant was permanent. Secondly the appellant contended that the trial judge failed to take into consideration the relevant facts to show that the voting taken at the meeting to terminate the services of the appellant was not *bona fide* but predetermined "as a political campaign by the MCA to sack the appellant." Thirdly it was also contended that the learned Judge's finding that the Chairman of the Local Council was not forced to sign the letter of termination was contrary to the evidence.

Held; (1) the relationship between the appellant and the Kulai Local Council in this case was solely contractual. In the absence of any other evidence the implied term of the contract was that the employment could be terminated by giving reasonable notice;

(2) on the evidence as was available before the trial judge it would be wholly unjustified to hold that the terms of service of the appellant were in parity with those of an officer in the public service;

(3) an employee is not entitled to question the motives of his employer if the employer has the right to dispense with his services at any time;

(4) by virtue of section 10 of the Local Council Ordinance, 1952, the power to appoint and to terminate the service of an employee of the local authority lies with the Council and not with the Chairman or the District Officer. In this case the act of the Chairman was only an administrative act to convey the decision of the Local Council to the appellant. Likewise the so called direction of the State Secretary, conveyed through the District Officer, was also administrative;

(5) the onus of proof was on the appellant to prove the allegations made by him and in this case he had failed to discharge that burden;

(6) having regard to the fact that the appellant had been serving the Council for more than 19 years, it would be fair and equitable to require a period of notice of six months.

Cases referred to:

(1) *Richardson* v. *Koefod* [1969] 3 All E.R. 1264.
(2) *Francis* v. *Municipal Councillors of Kuala Lumpur* [1962] M.L.J. 407.
(3) *Haji Ariffin* v. *Government of Pahang* [1969] 1 M.L.J. 6.
(4) *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578.
(5) *Shrinivas Ganesh* v. *Union of India* A.I.R. 1956 Bom. 455.
(6) *D'Cruz* v. *Seafield Amalgamated Rubber Co. Ltd.* [1963] M.L.J. 154.
(7) *Chiam Heng Hsien* v. *Jurong Town Corporation* [1983] 2 M.L.J. 193.

SUPREME COURT.

C.K.G. Pillay for the appellant.

S.H. Tan for the respondents.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): The suit before the learned trial Judge was for a declaration that the termination of service of the appellant as Secretary of the Local Council, Kulai, Johore on October 19, 1972 was null and void and of no effect with the usual consequential reliefs. In the statement of claim the particulars of the alleged wrongful termination may be summarised as follows:

(1) that the Chairman of the Local Council had no authority to terminate the appellant's service;

(2) alternatively, the purported termination was without just cause or excuse and that no proper and fair procedure was followed;

(3) by implication, custom usage and practice the

terms of service of the appellant were in parity with those of an officer in the public service and that one month's salary offered to him in lieu of notice was unreasonable and that he should have been given one year's notice.

In their statement of defence the respondents denied that the appellant's employment was unlawfully terminated or that the said termination was *ultra vires* the power of the Chairman of the Local Council or otherwise contrary to principles of natural justice. The statement of defence also denied that there was any such custom usage or practice in the employment of the appellant to make the employment in parity with employment in the public service and put the appellant to strict proof thereof.

The learned trial Judge dismissed the claims with costs and the appeal is against that decision.

There are many grounds of appeal but they may be summarised as follows. First the appellant challenged the finding of the trial Judge that there was no evidence to support the contention that the employment of the appellant was permanent. Secondly the appellant contended that the trial Judge failed to take into consideration the relevant facts to show that the voting taken at the meeting to terminate the services of the appellant was not *bona fide* but predetermined "as a political campaign by the MCA to sack the appellant." Thirdly it is also contended that the learned Judge's finding that the Chairman of the Local Council was not forced to sign the letter of termination is contrary to the evidence.

First, let us examine the facts as can be elicited from the evidence. The sequence of events can be retraced from the testimonies of the appellant (PW1), the Chairman of the Local Council at the material time (PW3) and the District Officer Kulai at the material time (DW1).

The appellant joined the Local Council Kulai, Johore on March 10, 1953. He was employed after a verbal interview by the then Chairman of the Local Council, since deceased. He served with the Local Council for more than 19 years until October 19, 1972 when he received the letter of termination. According to the appellant, during the interview with the late Chairman his terms and conditions of service were discussed. He understood that he was to be employed "permanently". PW3 said he was present at the interview of the appellant by the late Chairman and according to him the plaintiff was told that *"as long as he carried out his duty sincerely and honestly,the job was of a permanent nature"* (page 22 of the record). PW3 said he found the appellant's work satisfactory and efficient and he never received any complaint until January 1972 when he received a written complaint from three councillors asking him to convene a meeting of the Council to discuss the dismissal of the appellant. Nothing more of this complaint is known. The meeting was accordingly held on February 8, 1972 where the matter was discussed and a motion for the dismissal put to the vote. The Council voted 4 to 3 in favour of terminating the service of the appellant. PW3 said he was not satisfied with the dismissal as in his view it was all due to the bad relationship between the appellant and one councillor named Ho Kam, since also deceased. He also said he knew that a few of the MCA members were against the appellant and that a police report had been lodged against Ho Kam about insurance premiums.

Also present at the Council meeting on February 8, 1972 was K.V. Devan (PW4), a councillor who was at the same time acting MIC Chairman, Kulai. PW4 said he understood the appellant's job to be *"as long as the Local Council exists"* but *"as long as his work was satisfactory"* (page 28 of the record). PW4 thought that the termination was wrongful because in his opinion the Local Council had only authority "to recommend" dismissal.

The next witness to throw some light on the sequence of events was the then District Officer of Kulai (DW1). He received a copy of the minutes of the meeting of February 8, 1972 and noticed that one of the decisions taken was to terminate the service of the appellant. DW1 said that he also received direction from the State Secretary then to accept the decision of the Council. DW1 then called members of the Council to his office on October 19, 1972 and at the meeting conveyed to the members the direction of the State Secretary. It was at this meeting that the Chairman (PW3) signed the letter of termination (Exhibit P2).

As regards the first ground of appeal we agree with the trial judge that apart from the evidence referred to above on the employment of the appellant there was no other evidence to show what were the terms and conditions of his service with the Local Council other than that his salary was $300.00 per month with yearly increment. What can be drawn from the evidence is that he would be employed permanently so long as he

carried out his work sincerely, honestly and satisfactorily to the Council. It is also obvious that how Secretaries of other Local Councils were employed (PW2's terms and conditions of service with the Senai Local Council and PW5's terms and conditions of service with the Gelang Patah Local Council) would be irrelevant and of no help to the appellant's case as they were individually employed by different local councils.

Exhibit P1 is a letter from the District Officer addressed to the appellant asking him to be present at the proposed meeting. There is evidence that appellant was present at the meeting on October 19, 1972 (page 16) but he was told to leave the meeting held on February 8, 1972 (page 15).

The law applicable to the employment of the staff of a Local Council at the material time was the then Local Council Ordinance, 1952. Each of the local councils under the Local Council Ordinance 1952 was a body corporate. Section 10 of the Ordinance provided that the council "may appoint a secretary" and may pay him "such remuneration as the council may deem proper" provided that the person to be appointed shall be approved by the District Officer.

It cannot be correct in law to say that just because the Local Council is a body corporate under a statute its employees automatically become public officers for the purposes of their employment. In our view the relationship between the appellant and the Kulai Local Council in this case was solely contractual. In the absence of any other evidence the implied term of the contract was that the employment could be terminated by giving reasonable notice.

The law is clear that in the absence of expressed stipulation a contract of employment is determinable by reasonable notice. The length of notice depends on the circumstances of the case. There are many cases in the books showing what has been held reasonable for various employments. See also the judgment of Lord Denning in *Richardson* v. *Koefod.*[1]

The appellant was an employee of a local authority. *Halsbury's* 4th Edition Vol. 16 at page 369 refers to such employees as follows:

"Officers of local authorities are appointed on such reasonable terms and conditions as the authority thinks fit. Employees of national corporations are not in the position of civil servants and do not hold office at the pleasure of the Crown;"

In *Francis* v. *Municipal Councillors of Kuala Lumpur*[2] the appellant was on the permanent staff of the Municipality. There was a complaint made against him and certain actions were also taken administratively. However finally after an ordinary meeting of the Municipal Councillors subsequently a letter signed by the Acting Municipal Treasurer was sent to the appellant informing him that the Establishment Committee had decided to terminate his services from a certain date. Section 16(5) of the Municipal Ordinance then provided that the President of the Council of the Municipality may appoint such persons as he may think fit to the offices shown on an approved list and may remove such persons from office and appoint others in their stead provided that certain appointments above a certain salary (which did not apply to the appellant) would be subject to the approval of the Councillors. The trial Judge in that case dismissed the claim of the plaintiff. The Court of Appeal in allowing the appeal awarded damages for wrongful dismissal. All the judges in the Court of Appeal agreed that the power of the President under the said section 16(5) of the Municipal Ordinance was a power to remove at pleasure and to do so without cause, notice or hearing though it was a power to be exercised in the interests of good government in the Municipality. The majority held however that the appellant had in fact been dismissed by the Council and not by the President with the result there had been a wrongful dismissal which entitled the appellant to damages. The importance of the Privy Council's decision in *Francis'* case was only to restate the principle that a declaration that contract of service still subsists is rarely made save in special circumstances because the court will not normally grant specific performance of a contract of service. The Privy Council held there that the appellant's employment must be treated as having come to an end on the date of termination and its remedy lay in the claim for damages.

In *Haji Ariffin* v. *Government of Pahang*[3] the employee was in a stronger position in that he was employed by the Government of the State. On the recommendation of the head of the Religious Affairs Department of the State his service was terminated by three months' notice. He claimed that he was unlawfully dismissed and had not been given an opportunity to defend himself before his service was terminated. In the High Court he asked for declarations to that effect but the learned trial Judge (Raja Azlan Shah J., as he then was) held that plaintiff had a right to his post but subject to the express condition that his

appointment was terminable at one month's notice on either side and therefore termination was not a punishment so as to amount to a dismissal attracting the procedural protections of the Constitution. The Federal Court also dismissed the appeal and Suffian F.J. (as he then was) concluded his leading judgment as follows:

"To sum up – in my judgment, the Pahang State Government has the right to stipulate that a Kathi may be appointed subject to termination of service on notice or payment of salary in lieu. Such a condition is not inconsistent with the Constitution which indeed says that a member of the Pahang public service holds office at the pleasure of the Ruler. If it is inconsistent, then, notwithstanding such a condition, the Ruler may terminate the Kathi's appointment without notice or compensation; it does not mean that the Ruler may not terminate his service on notice or payment of salary in lieu. The exercise by the Ruler of such a contractual right to terminate is the same as the exercise by a private employer of a right to terminate the service of his employee under a contract containing a similar condition. While it is true that the Kathi whose service is terminated under such a contract has lost a steady job, the termination does not involve a penalty or punishment so as to make it a dismissal within the meaning of article 135(2) of the Constitution and it is not, therefore, necessary first to give him a reasonable opportunity of being heard. Dismissal as used in the public service is not any termination of service – it has a special meaning and involves a penalty or punishment."

Thus we are of the view that on the evidence as was available before the trial Judge it would be wholly unjustified to hold that the terms of service of the appellant were in parity with those of an officer in the public service. *Malloch* v. *Aberdeen Corporation*[4] is clearly distinguishable in that Lord Reid in the majority judgment allowed the appeal in view of the ambiguity of the regulations governing teachers in Scotland then before they could be dismissed.

We come now to the second ground of appeal. What is clear is that the matter was discussed at a meeting of the Local Council on February 8, 1972 and a vote was taken and the motion for termination was passed by a majority. The appellant contended that the Council was acting *mala fide.* It would be quite apparent from his own testimony that PW3 was not a person who could safely be regarded as an independent witness on the alleged "MCA's campaign to sack appellant" for PW3 himself was an active MCA party member then and also at the time of giving evidence. Finally PW4's evidence does not contribute anything to establish the alleged *mala fides* of the Council.

In any case a short answer to this complaint is to be found in a passage in the judgment of Chagla C.J. in *Shrinivas Ganesh v. Union of India*[5]:

"We do not understand how an employee is entitled to question the motives of his employer if the employer has the right to dispense with his services at any time.

Whatever may be the motive which may influence the exercise of a legal right, if the legal right exists, then the motive becomes irrelevant ..."

As regards the third ground of appeal it is clear on the evidence that the decision to terminate the service of the appellant was taken at the meeting of the Local Council on February 8, 1972. It is also clear that the decision of the Local Council remained unaltered at the second meeting on October 19, 1972. The act of the Chairman in signing the letter dated October 19, 1972 should therefore be regarded merely as an administrative act to convey the decision of the Local Council to the appellant. Likewise the so-called "direction" of the State Secretary was also administrative. In our view by virtue of Section 10 of the 1952 Ordinance the power to appoint and to terminate the service of an employee of the local authority lies with the Council and not with the Chairman or the District Officer.

Looking at the evidence made available to the trial Judge the question that comes to our mind is the degree of proof required of a plaintiff in a civil action. It is not enough for a plaintiff in a suit to make allegations but he must also adduce sufficient evidence to enable the court to form a conclusion on the balance of probability. The simple explanation in this case is that the appellant had failed to discharge that burden.

The only question left to be considered is whether the one month's notice given to the appellant is adequate notice. The appellant had served the Local Council for more than 19 years. In the matter of termination of employment under a contract of service it has generally been accepted that the higher the position held by the employee and the bigger his salary the longer would be the notice required to put an end to the contract of service. Gill J. (as he then was) decided that three months' notice in the case of an estate clerk with five to eight years' service would be adequate – *D'Cruz* v. *Seafield Amalgamated Rubber Co. Ltd.*[6] In *Francis* v. *Municipal Councillors of Kuala Lumpur (supra)* the Court of Appeal decided that the notice should be three months for an employee of seven years' service. In *Chiam Heng Hsien* v. *Jurong Town Corporation*[7] the plaintiff was employed as an executive officer by the cor-

poration and was confirmed in June 1972. In June 1976 it was found that he was in breach of certain provisions in the Jurong Town Corporation's Terms and Conditions of Service for taking up part-time employment elsewhere. After an enquiry he was found guilty of the charges and his service was terminated. He then filed a suit in the High Court for a declaration that he was still in the employment of the defendant corporation and entitled to be remunerated as such. Alternatively he claimed for damages for wrongful dismissal. His claim for the declaration was dismissed but the trial Judge held that in regard to the circumstances of the case the proper sum to award would be three months' salary.

It is also to be noted that the recent amendment to the Employment Act 1955 provides for eight weeks' notice for an employee with more than five years' service.

The unfortunate aspect of this case is that while the case was pending before the trial Judge the Government decided to make all Local Council employees permanent and pensionable officers and the Government Circular No. 1 of 1975 made that decision retrospective from January 1, 1970. The appellant had contended that had it not been for the termination of service he would have been made a permanent and pensionable officer. We can only say that our sympathies are with him. The circular was issued in 1975 and at that time the appellant's employment had already been lawfully terminated.

Over a wide field of employment the common law as to minimum period of notice of termination of service has been superseded by statute, in England by the Contracts of Employment Act 1972 and in Malaysia by the Employment Ordinance 1955 (Revised 1981). Section 12 of our Employment Ordinance merely prescribes the statutory minimum. Having regard to the fact that neither side adduced any evidence on the period of notice required in the case of the appellant's contract of service and that the appellant had been serving the Council for more than 19 years, it would fair and equitable in our view to require a period of notice of six months.

We accordingly allow the appeal. Since there is only evidence that appellant was offered one month's salary in lieu of notice but no evidence that he was actually paid one month's salary we order that six months' salary be paid to him with interest at the rate of 8% per annum effective from October 19, 1972. The appellant shall also be entitled to costs here and below.

Appeal allowed.

Solicitors: *Hassan Yunos & Co.; Abdul Raman Saad & Associates.*

NORDIN BIN HAJI ABDUL WAHAB v. MOHAMED SALLEH BIN HASSAN

[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C.JJ) February 26 & April 26, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 181 of 1985]

Tort – Negligence – Damages – Loss of earnings – Loss of future earnings – Prospects of promotion – Principle which should guide court in determining whether it should interfere with quantum of damages.

Damages – Leg – Hand – Fracture.

In this case the respondent, a Lance-Corporal in the army, was injured in a road accident. As a result of the accident he sustained the following injuries –

a) compound comminuted fracture of the upper 1/3 left tibia and fibula;

b) fracture of the lower 1/3 radius and segmental fracture of left ulna.

The learned trial judge considered that the respondent had a good chance of promotion eventually to Warrant Officer II and he computed the losses up to September 30, 1990 at $58,137.66. He also computed the reduction of future earnings at $25,588. The appellant appealed.

Held: (1) the principle which should guide the court sitting in appellate jurisdiction in determining whether it will interfere with the quantum of damages is well established. The appellate court is always slow to reverse the trial judge's decision on assessment of damages unless there are strong grounds for interference;

(2) in this case the trial judge was not realistic in considering the promotion prospects of the respondent, in that in real life an officer does not get promoted every three years in clockwork precision. Considering the whole of the evidence the respondent would have been promoted at the most to full Sergeant by the end of his military career;

(3) the pre-trial and post-trial losses of earnings would therefore be assessed at $27,022 and the reduction in future earnings at $12,800.